

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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77-1 079

PDS

To be argued by
ELIA WEINBACH

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1079

UNITED STATES OF AMERICA,

—against—

Appellee,

OTTO SCHMANSKI and PETER DIGIOVANNI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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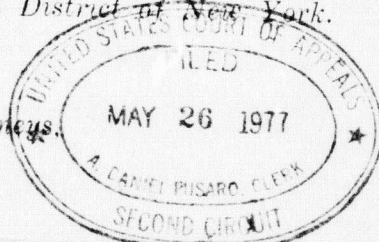


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—against—

OTTO SCHMANSKI and PETER DIGIOVANNI,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Otto Schmanski and Peter DiGiovanni appeal from judgments of the United States District Court for the Eastern District of New York (Weinstein, J.) entered on January 21, 1977 and on February 4, 1977, convicting each of them, after a jury trial, of the charges in both counts of a two count indictment. Count One of Indictment 76 Cr. 530 charged appellants with forcibly breaking into the United States Post Office at Eltingville, 4455 Amboy Road, Staten Island, New York, on May 22, 1976, with intent to commit a larceny or other depredation, in violation of Title 18, United States Code, Sections 2115 and 2. Count Two charged appellants with conspiracy to commit the forcible breaking into the same postal station, in violation of Title 18, United States Code, Section 371.

Judge Weinstein sentenced Schmanski to five (5) years imprisonment on each count, the sentences to run consecutively, for a total of ten (10) years. DiGiovanni was sentenced to two (2) years on each count, the sentences to run concurrently. Execution of the sentences for appellants was stayed pending appeal.

Appellant Schmanski contends on appeal that: (1) there was insufficient evidence to sustain the jury's finding of a forcible breaking into the postal station; (2) Judge Weinstein improperly admitted an opinion of a lay witness that the door of the postal station had been "jimmied;" (3) the jurors may have improperly relied upon hearsay in the form of a label on a pry bar admitted in evidence; and (4) the prosecutor's summation was improper in that it relied upon improperly admitted opinions and evidence and on impermissible, unproven inferences.

Appellant DiGiovanni argues that the evidence was insufficient to convict him and contends that the proof merely showed his presence at the scene of the crime. In addition, DiGiovanni claims reversible error in Judge Weinstein's failure to charge that mere presence at the scene of a crime does not itself establish aiding or abetting or membership in a conspiracy.

Statement of Facts

A. The Government's Case

The Government's case in this short trial consisted of the testimony of three United States Postal Service employees and two New York City Police Officers who arrested appellants, as well as the admission in evidence of a number of photographs and a fairly complete set of tools found at the postal station by the arresting officers.¹

¹ The trial took one day, and the entire transcript is 146 pages.

The evidence showed that on Saturday evening, May 22, 1976, at approximately 10:30 P.M., an alarm originating from the Eltingville Postal Station on Staten Island alerted U.S. Postal Service Security Supervisor Edward McDermott (A-22, 23).² The alarm, although tripped off in the Eltingville Postal Station, would not have been heard by anyone in the station, which had been closed to the public at noon that day (A-19, 23).³ After receiving the alarm in Brooklyn, McDermott went to the postal station on Staten Island, checked the doors and points of entry, and at trial identified several photographs, which he stated fairly and accurately represented the condition of the interior of the postal station and the cyclone fence at the side of the station when he saw them on May 22, 1976 (A-26, 27).⁴

At approximately the same time that McDermott received the alarm, two New York City Police Officers, Robert Seton-Harris and Leonard Ames, working in a patrol car on Staten Island, received a call in their car

² Numbers in parentheses refer to pages in Appellant's Appendix.

³ McDermott explained that the entire area around the vault, the walls and ceiling, were sensitized so that any drilling, hammering, or vibrations would trigger the alarm. Also, cutting of the wires of the system would trip the alarm and register to the telephone in McDermott's office (A-23, 27).

⁴ McDermott and the two police officers who arrested appellants were shown several photographs of the exterior and interior of the postal station. Six of these photographs, which were received in evidence, show a front view of the postal station (GA-1), the side walkway (GA-2), the side door (GA-3), a portion of the fence around the postal station (GA-4), the vault room (GA-5), and a close-up of the side door of the postal station shown in GA-3 (GA-6). The photographs are included in the Government's Appendix.

References designated "GA" are to pages of the Government's Appendix.

and proceeded to the United States Postal Station at 4455 Amboy Road (A-29). Officers Seton-Harris and Ames stopped their car in front of the station (GA-1). Seton-Harris got out of the car and walked down the right side of the building toward the side door of the postal station (A-29, GA-2, 3). As he did so, he saw two figures emerge from an exit door, jump a fence, and run into the adjacent brush area on the right (A-31). Seton-Harris also saw a third figure come out of the same door, within a matter of seconds; his eyes were fixed, however, on the two fleeing individuals (A-49). He chased the two, eventually tackling and subduing one whom he identified in court as Otto Schmanski (A-32). The second fleeing man was never caught (A-44).

Schmanski and Seton-Harris fell to the ground, where the officer was about to place handcuffs on Schmanski when he noticed that Schmanski had a pair of work-type gloves on his hands, which were removed before the handcuffs could be placed on him (A-32, 33). Schmanski, who was placed under arrest at 11:00 P.M., was wearing a grey jacket, dark pants, and a dark blue shirt. He was also wearing rubbers (A-54).

While Officer Seton-Harris was chasing Schmanski, Officer Ames went to the front door of the postal station and found everything secure (A-66). Ames then went to the area where Seton-Harris had gone (to Ames' right). Hearing Seton-Harris' call, Ames continued toward him, but as Ames approached, Seton-Harris ran off "at an angle" (A-67). Ames proceeded along the side of the building and observed a person on the ground by a fence (A-67). Ames initially saw the man⁵ from about fifteen to twenty feet; the man's body was prone and coming

⁵ Ames testified that he saw a form and he kept his eyes on the form (A-84, 86).

out of a hole in the fence (A-65, 80, GA-4). Drawing his gun, Ames told the man to stop, which he did. Ames then called to his partner, and then placed the man, who was wearing old clothes, under arrest (A-69). Appellant DiGiovanni was identified as the man whom Ames arrested (A-69).

After placing DiGiovanni under arrest, Ames met Seton-Harris, who had Schmanski in tow, and the two officers and two arrested men went to the police car (A-33). Officer Seton-Harris stayed in the car with the two prisoners, and Ames returned to the site where he had arrested DiGiovanni (A-71). He bent down at the hole in the fence and found a prybar and a set of bolt cutters, which were between the hole and the platform leading to the postal station (A-71, 72, 86, GA-2).

Officer Seton-Harris eventually left the car and entered the postal station, through the door from which the three figures had previously emerged (A-35, GA-3). He inspected the side door (GA-3), the vault room (GA-5), and the fence beside the side door (GA-4). Seton-Harris testified that the fence had been cut and the side door had been "jimmied" (A-35, GA-4), and Officer Ames said there were marks around the door lock (A-75, GA-6). Inside the postal station, Seton-Harris went to the front part of the building, where there was a large walk-in safe, and noticed that a piece of panel board had been broken away at the lower part of the wall, adjacent to the door of the safe (A-35, GA-5).⁶ Seton-Harris also saw a canvas bag filled with assorted tools, including a crowbar,

⁶ Officer Ames testified that he saw the burglars' tools laid out approximately three feet away from a wall that had a round hole in it, through which there protruded severed wires. A piece of sheetrock, part of the wall, had been ripped away. The tools were on the floor, opposite the hole in the wall, set out "like a doctor who laid out tools for an operation" (A-73).

wire cutter, three pound hammer, electric drill, hacksaw, small prybar, ten drill bits, three screwdrivers, two flashlights, five punches, two knives, and four cold chisels (A-36-39).

The condition of the postal station as Officers Seton-Harris and Ames found it at approximately 11:00 o'clock at night was different from the way in which Thomas Trabosci left it on May 22, 1976. Trabosci, a postal employee, was the last to leave the building on May 22, 1976 (A-17). Defense counsel stipulated that the postal station was in good order, that the walls were not ripped away, and the safe not broken into when Mr. Trabosci left the post office (A-18).⁷

B. The Defense Case

Neither Schmanski nor DiGiovanni testified and neither presented any witnesses or evidence.

ARGUMENT

POINT I

The Evidence Was Sufficient To Convict Appellant Schmanski.

Appellant Schmanski argues that the evidence was insufficient to convict him of the crimes charged. Specifically, he contends that the Government failed to establish

⁷ Trabosci identified various photographs of the exterior of the postal station. When shown a photograph of the vault room (GA-5), he stated that he had been in the room on May 22 and that the condition of the wall depicted was different from when he had seen it.

that there was a forcible entry into the postal station.⁸ We submit that the claim is without merit.

At the end of the Government's case, as well as after the jury returned its verdict of guilty on all counts against both appellants, counsel for appellants at trial moved for directed verdicts of acquittal. Judge Weinstein denied appellants' motions on each occasion.

Viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the evidence showed that (1) a silent alarm was tripped off in a Staten Island postal station on May 22, 1976; (2) within a few minutes of the alarm being activated, two police officers went to the building; (3) one officer saw three figures emerge from a side door of the postal station; (4) one of the two men *running* away from the postal station was caught and identified as Otto Schmanski; (5) Otto Schmanski was wearing work gloves at the time of arrest; (6) one person found lying prone on the ground near a hole in the fence, close to the side door of the postal station, and close to where a pair of bolt cutters were later found, was identified as Peter Di-Giovanni; (7) the side door of the postal station had been tampered with, most probably with a prybar subsequently found near the bolt cutter between the fence and the platform leading into the post office; (8) numerous tools were found within the postal station where a portion of the wall had been ripped open, wires severed, and a hole drilled, all next to the walk-in vault of the postal station; and (9) the postal station was "in order" on May 22 when the last employee left for the day.

⁸ Title 18, United States Code, Section 2115 provides in pertinent part as follows:

Whoever forcibly breaks into or attempts to break into any post office . . . with intent to commit in such post office . . . any larceny or other depredation.

While it is true that there was no direct evidence showing appellants entering the building or possessing any of the tools found in the postal station or near the fence, we submit that this case may be a classic example of why circumstantial evidence may be accorded the same weight and probative value as direct evidence, *United States v. Manfredi*, 488 F.2d 588 (2d Cir.), cert. denied, 417 U.S. 936 (1974); *United States v. Bowles*, 428 F.2d 592, 597 (2d Cir.), cert. denied, 400 U.S. 928 (1970), and why circumstantial evidence may be sufficient by itself to sustain a conviction. *Glasser v. United States*, supra. See, e.g. *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974). Appellants were virtually caught "red-handed". Had the police officers arrived any earlier, or with less commotion, they undoubtedly would have been able to greet appellants at the door or within the postal station, hammering and chiselling away at the vault.

Appellant Schmanski claims that there was insufficient evidence of forcible entry because the picture of the side door of the postal station (from which appellants emerged) shows a condition that is, in appellant's view, "as much proof that the door was old as it is that the door was tampered with". (Appellant Schmanski Brief, at 13). The argument is ludicrous. The photograph of the door clearly shows a wide scrape, a screw missing and bent metal trim (GA-6). In addition, Officer Ames testified that a prybar was found between the hole (in the fence) and the platform that leads into the post office by the side entrance (A-72, GA-3). Moreover, the defense stipulated that at the close of business on May 22nd the postal station was in good order, the walls not ripped away, and the safe not broken into (A-18). Furthermore, contrary to appellant's contention, there is no requirement that conflicting inferences as regards the condition of the door need be resolved in appellants' favor. *Holland v. United States*, 348 U.S. 121, 138-40 (1954);

United States v. Warren, 453 F.2d 738, 745 (2d Cir.), cert. denied, 406 U.S. 944 (1972). Indeed, there is also no requirement that the Government must show the condition of the door prior to the forcible entry. *Smith v. United States*, 413 F.2d 1121 (5th Cir. 1969).

In *Smith*, investigators who searched a postal building that had been burglarized found that a lock to a rear door had been forced open, that screws holding hasps of the lock to the post office door had been pried out, and that the edges of a safe door were bent. An investigating team had been alerted by a tip that the postal station would be broken into, and in fact, surveillance was conducted in the area prior to the breaking. The investigators did not, however, inspect the building prior to the breaking, and at trial, the prosecution offered no evidence concerning the pre-existing condition of the postal station. Nevertheless, despite the lack of testimony regarding the pre-existing condition of the building, the Fifth Circuit stated that the testimony regarding the condition of the door given by the proprietor of the postal station and the detective who entered the building was sufficient to permit the jury to conclude that there had been a forcible breaking. *Smith v. United States*, supra, at 1124. We submit the evidence clearly shows that Schmanski and DiGiovanni forcibly entered the Eltingville postal station.⁹

⁹ We note of course that even if they were valid, appellants' claims of insufficiency with respect to the showing of forcible entry would have no effect on the conviction under the conspiracy count.

POINT II

**No Expert Testimony Was Required To Prove
Forcible Entry Into The Postal Station.**

Appellant Schmanski also contends that the testimony of an expert witness was required in order to establish that the post-crime condition of the door clearly indicated a forcible entry. It is claimed that Officer Seton-Harris' testimony that the side door had been jimmied (A-35) was incompetent and altogether nonprobative as the conclusion of a non-expert witness.¹⁰

We submit, however, that appellant's argument ignores Rule 701 of the Federal Rules of Evidence which provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

¹⁰ The same kind of testimony which was offered in *Smith v. United States*, *supra*, regarding the condition of the building after the breaking was offered in the instant case. In *Smith*, the detective testified that he and other officers entered the postal building through a door that was broken open, "which appeared to be forcibly opened." Another inspector testified that "the rear door of the store was standing, was partially open, bearing evidence that the lock had been pried out with some kind of a pry tool." *Smith*, at 1124. (Emphasis added).

The Fifth Circuit characterized the inspector's description as "illuminating," and there is no reason to believe that Officer Seton-Harris' description of the door in the instant case was not equally illuminating to the jury. Moreover, in the instant case, unlike in *Smith*, Officer Seton-Harris did not use the words "forcibly open," which appellant would undoubtedly have characterized as a legal conclusion, in any event now admissible under Rule 704 of the Federal Rules of Evidence, *infra*. See *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2825 (2d Cir., April 13, 1977).

Moreover, Rule 704 states:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Officer Seton-Harris was not testifying as an expert. He was asked what he saw, and his response was that the door was "jimmied" (A-35). To the extent that the word "jimmied" is an opinion, we submit that its use was "rationally based" on Officer Seton-Harris perception and indisputably helpful to "a clear understanding of his testimony and the determination of a fact in issue." In *United States v. Morgan*, Dkt. No. 76-1497, slip op. 2997, 3001 (2d Cir. April 18, 1977) a case where an expert witness did give an opinion to a hypothetical question, this Court cited the rule which we suggest is applicable.

So long as proper guidance by a trial court leaves the jury free to exercise its untrammelled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not to be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules. *United States v. Johnson*, 319 U.S. 503, 519-520 (1943).

The principal case upon which appellants rely, *Schwartz v. United States*, 82 F.2d 725 (8th Cir. 1936), was decided prior to the adoption of the Federal Rules of Evidence. In addition, unlike in the instant case, there was no evidence whatever of a breaking. The proprietor of a store, which was also a postal station, testified that he came to his store and noticed that the post office safe was gone and that there were automobile tracks around

the back of the store. In addition, a witness testified that she recalled the time that the post office was burglarized, and the county sheriff also testified that he received information that the post office had been burglarized. As the Court said, the testimony of these latter witnesses "consisted in the legal conclusion of lay witnesses . . . This was an opinion of unqualified witnesses, which was not based upon nor supported by any established facts, physical or otherwise." *Schwychart*, at 727. In contrast, in the instant case, as in *Smith v. United States*, *supra*, the testimony given was of personal observations by police officers, engaged in investigating a suspected burglary.¹¹

POINT III

There Was No Error In The Admission Into Evidence Of The Label On The Prybar.

Appellant Schmanski further argues that "the most egregious error in the record" was the unintentional admission into evidence of a label affixed to the prybar admitted into evidence. (Appellant Schmanski Brief, at 17). The argument apparently is that the label on the prybar was hearsay, and that its contents, if read by the jury, were so prejudicial that appellants were denied a fair trial. The contention is absurd.

The prybar was found near the hole in the fence where Peter DiGiovanni lay prone when Officer Ames discovered him (A-72). The label on the prybar states that it is a Stanley Wonder Bar which "pulls, pries, lifts, and scrapes" and that it is contoured to permit many

¹¹ Even assuming *arguendo* that expert testimony was needed, it is difficult to imagine who might better qualify as an expert in making the observation that a door had been jimmied than a police officer.

different pulling, prying and lifting jobs, such as removing wood trim and sash, shingles and siding, wall paneling and flooring (Gov. Ex. 27).

No mention of the label was made in the entire trial transcript, and Schmanski concedes that its admission was accidental, "presumably unnoticed by all counsel and by the trial judge." (Appellant Schmanski Brief, at 17). There is no suggestion, for example, that counsel at trial did not have an opportunity to examine the prybar, after which they presumably could have objected to the admission of the label. There is also no indication in the trial record that the prybar was passed among the members of the jury during the course of the trial. Various exhibits were requested by jury notes during the deliberations, but the prybar was never the subject of a jury request. Thus, there is no support for the claim that the jurors even saw the label.¹² Yet, appellant surmises that, if the label was seen by any member of the jury, that fact warrants reversal of appellant's conviction, presumably on a theory of deprivation of the right of confrontation.

Even conceding *arguendo* that the label itself is technically hearsay, we submit that its admission in evidence by the district court was at most harmless error, particularly since, as appellant concedes, the admission of the label was inadvertent and, in any event, there was, we submit, overwhelming evidence of guilt. See *United States v. Mandell*, 525 F.2d 671, 680-81 (7th Cir.), cert. denied, 423 U.S. 1049 (1976) (inadvertence of Government inquiry into statements defendant made at time of arrest helps render error harmless).

Finally, the absurdity of appellants' argument can best be seen if, instead of a label being on the prybar, it

¹² The prybar itself is a little over one foot long; the label, which is in the middle of the bar, measures 6¾ inches by 1¼ inches, the words "pulls, pries, lifts, scrapes" are approximately ⅞ inch high.

had been on the hammer or screwdriver, describing either of their qualities. Even assuming that a prybar is less familiar to the average juror than a hammer or screwdriver, the fact is that its physical appearance adequately conveys without words its function.¹³

POINT IV

The Evidence Was Sufficient To Convict Appellant DiGiovanni.

Appellant DiGiovanni argues that the Government allegedly proved nothing more than his mere presence at the scene of the crime. We submit that the argument is without merit.

Willful participation in a criminal enterprise may be established by evidence which is completely circumstantial. *United States v. Manfredi*, 488 F.2d 588, *supra*. In order to be convicted of aiding and abetting, a "defendant must be shown to have knowingly associated with and participated in the criminal venture in a manner designed to accomplish its goal." *United States v. Mariani*, 539 F.2d 915, 919 (2d Cir. 1976). Thus, there must be an evidentiary basis for inferring that DiGiovanni knew about the burglary and intended to participate in it or make it succeed. *United States v. Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, *supra*, the evidence clearly and overwhelmingly connected DiGiovanni to the burglary of the postal station. First, DiGiovanni was seen leaving the postal station, which moments before had obviously been burglarized by someone. The jury

¹³ We submit that our arguments with respect to the testimony of Officer Seton-Harris and the admission of the prybar fully respond to appellant Schmanski's claim that the prosecutor's summation relied upon unproven and impermissible inferences.

could have reasonably believed that DiGiovanni was the third figure seen by Officer Seton-Harris emerging from the side door of the postal station (A-49). Second, the time, location, and circumstances of DiGiovanni's presence at the scene were unquestionably suspicious. DiGiovanni was found late on a Saturday night hiding in a field adjacent to a closed postal station. A few minutes before he was arrested, two men, one of whom was Otto Schmanski, jumped out of the side door of the building, hopped over a fence, and, after a short chase, Schmanski was caught. The police officer could not put handcuffs on Schmanski because he was wearing work gloves. Third, DiGiovanni's *posture* at the scene of the crime showed beyond a doubt that he was engaged in something more than looking for worms or checking the condition of the cyclone fence, and that he was in fact attempting to conceal his presence in order to avoid detection by the police. Flight from the scene of a crime, as well as concealment, are universally recognized as evidence of consciousness of guilt, *Sibron v. New York*, 392 U.S. 40, 66 (1968). See generally Wigmore, *Evidence* (3rd Ed.) § 276. Fourth, the jury could have logically found that the bolt cutter and prybar found near where DiGiovanni lay were used respectively to cut a hole in the cyclone fence and to pry open the side door of the postal station. Fifth, and finally, the jury could reasonably have believed that because of the peculiar position DiGiovanni decided to adopt prior to being discovered, he was linked not only to the pry bar and bolt cutter, but also to the tools found within the postal station and to the unsuccessful efforts to pierce the vault.

Cases cited by DiGiovanni in which this Court and other courts have found insufficient evidence to sustain convictions are readily distinguishable on their facts from the instant case. In *United States v. Johnson*, 513 F.2d 819 (2d Cir. 1975), this Court reversed a conviction for

narcotics smuggling where the evidence showed that the defendant Johnson was merely seated in a car owned and driven by his friend. The car contained narcotics concealed behind a door panel. The evidence indisputably showed that Johnson did not buy the drugs and had nothing to do with the drug transaction. The strongest evidence against Johnson (apart from his presence in the car) was a post-arrest statement in which Johnson falsely said he did not know his friend. In *United States v. Barfield*, 447 F.2d 85 (5th Cir. 1971), a postal burglary case, defendant Barfield was seen in a bar across the street from a recently burglarized post office, talking to one of two men seen earlier in the postal station and suspected of burglarizing it. Barfield was also later found in a car driven by the same man, and a large number of tools were found in the car. On these facts, the Fifth Circuit reversed Barfield's conviction for aiding and abetting in the breaking in of the postal station.

Finally, in *United States v. Barber*, 429 F.2d 1394 (3rd Cir. 1970), the Third Circuit reversed the conviction of one defendant, Loper, on charges of aiding and abetting in the assault of F.B.I. agents. The evidence showed that Loper was one person in a group of twelve to fifteen men, some of whom assaulted F.B.I. agents, but there was insufficient proof that Loper himself acted unlawfully or encouraged others to do so. The Court stated that "*something of significance* beyond the fact of presence is necessary to justify a conviction." *Barber*, at 1397.¹⁴

¹⁴ The Court cited as examples of clear indications of wrong doing the following: serving as a lookout; orally encouraging an assault; seeking to block the escape of a victim; and flight from the scene of a crime with actual perpetrators. *Barber*, at 1397, fn. 4.

Each case must of course be judged on its own facts, particularly on the issue of sufficiency, but we submit that each of the foregoing cases is different from the instant case. In all of the above cases it is clear that someone other than the defendant was identified as the principal miscreant. In the instant case, because of Officer Seton-Harris' testimony that three people emerged from the side door, it was reasonable for the jury to conclude that DiGiovanni was a principal. Secondly, in *Barfield*, it was undisputed that the defendant was not at the scene of the crime when the crime occurred; in *Barber*, the defendant was only present in a crowd whose members menaced F.B.I. agents, and in *Johnson*, the defendant was merely in the car when it was searched but did not buy the drugs. In the instant case, not only was DiGiovanni present at the scene of the crime, but his physical position and location at the time of discovery clearly distinguish this case from those cited above and demonstrate that he participated in the burglary at the postal station.

POINT V

The District Court Did Not Commit Reversible Error In Failing To Charge That Mere Presence At The Scene Of A Crime Does Not By Itself Establish Aiding Or Abetting Or Membership In A Conspiracy.

DiGiovanni also claims that Judge Weinstein committed reversible error in failing to give a charge, unrequested by DiGiovanni's trial counsel, that evidence of mere presence at a crime does not establish participation in the crime itself. *United States v. MacDougal-Pena*, 545 F.2d 833 (2d Cir. 1976); *United States v. Erb*, 543 F.2d 438 (2d Cir. 1976), *cert. denied*, — U.S. —; *United States v. Garguilo*, 310 F.2d 249 (2d Cir. 1962). The claim is without merit for three reasons.

First, we submit that Judge Weinstein's charge, even though it did not use the words "mere knowledge" or "mere presence", incorporated the essential thought expressed by this Court in *Garguilo, Erb, and MacDougal-Pena*; namely, that to be convicted as an aider and abetter or conspirator there must be evidence of knowing and purposeful association with others in criminal activity. In his charge, Judge Weinstein first stated that:

The fact that [appellants] were found together, if they were so found, doesn't necessarily mean that they were associated. You have to determine that. (A-109, 110).

Judge Weinstein then defined aiding and abetting:

In order to find aiding or abetting, it is necessary to find that a defendant wilfully associated himself in some way with the criminal venture charged and that he wilfully participated in it as he would something he wished to bring about.

So, if you want to find out if the defendant aided or abetted, you must ask yourself such questions as: Did he wilfully or knowingly associate himself with this criminal venture, if you find it was one, to break into a Post Office to commit a larceny or to take some of the objects? Did he participate in it as something he wanted to make succeed? If he did, he is an aider or an abetter (A-111, 112).

In the charge on conspiracy, Judge Weinstein stated in relevant part:

A conspiracy is a combination of two or more people to accomplish an unlawful purpose. It is not necessary that the persons charged entered into any express or formal agreement, which they

stated orally or in writing how they will proceed. It is sufficient that it showed they came to an understanding to accomplish an unlawful act. The common design is the essence of this charge. The agreement may be inferred from the circumstances and conduct of the parties, as you found them or as you will find them. It is not necessary for the Government to show that there was any physical contact during the course of the activities charged here but *mere innocent association is not enough to constitute the basis for such a charge.* (Emphasis added, A-113).

We submit that Judge Weinstein's charge was clear, direct, concise, unclouded by abstract examples, and conveyed the essential meaning of the crimes of aiding and abetting and of conspiracy. In contrast, in *Garguilo*, this Court found the District Court's charge murky because of hypothetical examples offered to the jury to illustrate aiding and abetting.¹⁵ The jury's confusion was apparent from the record and this Court stated:

[t]he jurors never were told in plain words that mere presence and guilty knowledge . . . would not suffice unless they were convinced beyond a reasonable doubt that Macchia was doing something to forward the crime; that he was a participant rather than merely a knowing spectator (at 254).

¹⁵ In *Garguilo* (at 253) this Court recognized that participation in a criminal venture may be proved by circumstantial evidence, *United States v. Lefkowitz*, 284 F.2d 310, 315-316 (2d Cir. 1960), and noted that:

There may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought "by his action to make it succeed—for example . . . the maintenance at the scene of crime of someone useful as a lookout."

In the instant case, in contrast, as in *United States v. Erb, supra*, Judge Weinstein clearly told the jury that they had to find that DiGiovanni in some way associated himself with Schmanski and that by his actions sought to make the criminal venture succeed, and the jury apparently had no difficulty understanding the charge. *United States v. Erb, supra*, 447.

Second, we submit that under the circumstances of the instant case no "mere presence" or "mere knowledge" charge was necessary. In *MacDougal-Pena*, this Court stated that "a *Garguilo*-type charge regarding presence and guilty knowledge should be given, *when appropriate*, in the future whether requested or not." (Emphasis added). We suggest that in view of DiGiovanni's position at the time of arrest, a mere presence or mere knowledge charge was not required. DiGiovanni was found by police officers in a classically compromised position, in a posture which no reasonable person could believe—given the time of day, the place, and the fact that a burglary had moments before occurred—was in any reasonable way consistent with innocent activity.

Finally, even if this Court does find that Judge Weinstein erred in not giving the *Garguilo*-type charge, we submit that despite the admonitions in *Erb* and *MacDougal-Pena*, the failure should not require reversal because in the instant case, there was no request for a *Garguilo*-type charge (A-104). Cf. *United States v. Terrell*, 474 F.2d 872, 876 (2d Cir. 1973) (conviction reversed where District Court failed to give requested *Garguilo*-type charge).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
May 23, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 26th day of May 1977 he served a copy of the within
BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
MARKEWICH, ROSENHAUS, MARKEWICH & FRIEDMAN, P.C., 350 FIFTH AVENUE,
NEW YORK, NEW YORK, HERBERT I. HANDMAN, ESQ., 16 WEST 68th STREET,
NEW YORK, NEW YORK 10023

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this
26th day of May 1977

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979